IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 21, 2009

# STATE OF TENNESSEE v. JEFFERY SIMMONS

**Direct Appeal from the Circuit Court for Warren County**
**No. F-8245 Larry B. Stanley, Jr., Judge**

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**No. M2007-01383-CCA-R3-CD - Filed January 6, 2010**

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A Warren County jury convicted the Defendant, Jeffery Simmons, of four counts of aggravated sexual battery, and the trial court sentenced him to eight years on each count and ordered the sentences to run consecutively, for an effective sentence of thirty-two years. The Defendant appeals, contending: (1) the evidence is insufficient to sustain his convictions; (2) the trial court improperly instructed the jury after the jury deadlocked; and (3) the trial court erred when it ordered consecutive sentencing. The State contends that the Defendant's appeal should be dismissed for failure to file a timely motion for new trial and notice of appeal. We conclude that the Defendant's failure to file a timely motion for a new trial waived consideration of the Defendant's objections to the jury instructions in this case. We elect, in the interest of justice, to review the sufficiency of the evidence and the trial court's order of consecutive sentencing. After thoroughly reviewing the record and applicable authorities, we affirm the trial court's judgments.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Dan Bryant and Scott Grissom, McMinnville, Tennessee (at trial) and Kevin S. Latta, Smithville, Tennessee (on appeal), for the Appellant, Jeffery Simmons.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Benjamin A. Ball, Assistant Attorney General; Dale Potter, District Attorney General; Tom Miner, Assistant District Attorney General, for the Appellee, State of Tennessee.

## OPINION

### I. Facts

### A. Trial

This case arises from the Defendant's 1999 sexual interactions with an eight-year-old child,

A.W.[1] A Warren County grand jury indicted the Defendant on four counts of aggravated sexual battery.[2] At his trial on these charges, the following evidence was presented: Ray Gilder, a pastor of Gath Baptist Church, testified that his church owned a parsonage approximately one hundred yards from the church. The Defendant was hired as the part-time youth minister, for children ages six through eighteen, and moved into the parsonage. After the Defendant worked in this capacity a short time, Church officials asked him to become the children's minister as well, a position that ministered to children in the first through fifth grade. Gilder described the Defendant as being involved in "the life of the church," explaining that he also sang in the churchquartet.

Gilder testified that, on May 3, 2000, he and two deacons, Jimmy Blakenship and Jimmy Vaughn, met with the Defendant, who told them that he had been having marital problems and had not engaged in sexual relations in two-and-a-half years. The Defendant relayed that, because of this, he was having problems relating to other women. The Defendant said he considered seeking counseling but feared a negative reaction from the church. After this meeting, the church officials terminated his employment and prohibited the Defendant from working with the youth. The pastor made an announcement to the congregation to this effect on May 7, 2000.

Pastor Gilder said that, later that day, he received a call from Matt and Betsy Welcome, who were members of the church and the victim's parents. Following that discussion, they called the police and the Department of Children's Services.

The pastor testified that, after church officials dismissed the Defendant, they informed the Defendant that he had to vacate the parsonage by the first week of June. The pastor and the minister of music helped the Defendant's wife and children relocate to Murfreesboro. Gilder described the layout of the parsonage, saying that there is a bedroom that has an interior bathroom located adjacent to the den.

On cross-examination, Pastor Gilder testified the Ministerial Referral Service from the Tennessee Baptist Convention sent the pastor the Defendant's resume. The pastor checked all of the Defendant's references. The Defendant moved into the parsonage sometime during the summer of 1999, when he was hired, and he commuted at first from Murfreesboro, coming just for church services. Later, when he moved into the parsonage, he still commuted to Nashville for his full-time employment of servicing copy machines.

Betsy Welcome, the victim's mother, testified she and her husband had been married thirteen years and had two children. Mrs. Welcome said she was a member of Gath Baptist Church, where

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[1] In order to protect their privacy, it is the policy of this Court to refer to children of sexual abuse by their initials only.

[2] The Defendant seems to have been indicted for five counts of aggravated sexual battery and one count of solicitation of a minor, but the record is clear he was tried on only four counts of aggravated sexual battery. While it is unclear from the record, the fifth count of aggravated sexual battery and the solicitation of a minor charge may have been severed from the others.

the Defendant served as the youth minister. Mrs. Welcome recalled that the Defendant lived with his wife and children in the parsonage, and she thought she had been to their home on one occasion. Mrs. Welcome said that her daughter, A.W., and the Defendant's daughter, H.S., who was one year older than A.W., were good friends. A.W. frequently attended church-related activities with her family, and, between the morning and evening services on Sunday, A.W. would stay at the parsonage with H.S. Mrs. Welcome testified that, on multiple occasions, A.W. spent the night with H.S. at the parsonage.

Mrs. Welcome testified that she was present when Pastor Gilder made the announcement that the church had terminated the Defendant's employment. As a result of a conversation Mrs. Welcome had with A.W. that evening, church officials were called to come to the Welcome home. After speaking with them, she called law enforcement officials.

On cross-examination, Mrs. Welcome testified that A.W. spent the night at the parsonage on the Friday of the local fair in September 1999. She said the Defendant, his wife, and their two children picked A.W. up from the Welcome home and went to the fair. A.W. called and asked Mrs. Welcome if she could spend the night at the parsonage. Mrs. Welcome said that she picked A.W. up the next morning and A.W. appeared fine and did not voice any complaints. Mrs. Welcome testified that the idea for each sleep-over came from A.W. and H.S. and that A.W. went to the home freely. Mrs. Welcome said she could not recall the dates of the other sleep-overs but estimated that A.W. spent the night fewer than ten times.

A.W. testified that, at the time of trial, she was twelve years old. She knew the Defendant because he was the youth minister at Gath Baptist Church when her family attended there. A.W. participated in youth activities at the church, and she and H.S. became friends. A.W. testified she visited H.S. in her home at the parsonage "pretty often," sometimes between church services or after services. A.W. thought the first time she spent the night was in July or August of 1999, when she was eight years old. After gaining permission from their parents to spend the night together, the girls planned to stay up all night in the den, which was adjacent to the Defendant's bedroom. A.W. said that there was a couch in the den that converted into a bed that had been made up for them to sleep in the night she spent the night.

A.W. recalled that, while she was at H.S.'s house, the two played and watched television. A.W. recalled that at one point she was alone in the den, lying on the couch and watching David Letterman on television. The Defendant came into the room, lay behind her, and placed his hands down her pants and between her legs. He said "other girls liked it when he did this" and began rubbing up against her skin. A.W. told the Defendant she had to use the bathroom, got up, and went to the bathroom, where she cried. When she came out of the bathroom, she found H.S. asleep in the den. A.W. said she woke H.S., and the two went to H.S.'s room to play.

A.W. said she did not tell H.S. what had happened because she was scared H.S. would think she was lying and no longer be friends with her. A.W. said she did not tell anyone because, although the Defendant did not threaten her, she was scared of the consequences of coming forward. A.W. said

she remained friends with H.S. after this incident and went to the parsonage other times without incident.

A.W. testified she asked to spend the night at H.S.'s house again the Friday of "fair week." A.W. testified she went to the fair with the Defendant and his family, and left the fair shortly before midnight. They went to Taco Bell, where the Defendant told her it was too late to take her home and asked if she would call her mom and ask if she could spend the night. A.W. said she did so, and her mother agreed. A.W. said she and H.S. again attempted to stay up all night. One of them would rest while the other stayed awake, and then they would wake each other up, so they could stay awake all night. A.W. testified that H.S. was in a chair on her right and she was lying on her side on the couch again watching David Letterman. The Defendant lay behind her and placed his hands down her pants and between her legs and again began rubbing against her skin. She again told him she had to go to the bathroom, and he was gone when she returned. A.W. said she went to sleep. A.W. said she was "shocked" and did not know what to do, so she did not tell anyone.

A.W. testified that she spent the night at H.S.'s house again during the Christmas break, sometime between December 26, 1999, and January 6, 2000. She and H.S. asked their respective parents if A.W. could spend the night at H.S.'s house, and the parents agreed. A.W. said that the two again planned to sleep in the den, explaining that H.S. had a twin bed in her room and that there was not enough room for both of them. A.W. was watching television in the den when the Defendant came from his room, placed his hands under A.W.'s clothes, and rubbed her between her legs "on the skin." A.W. said she again told the Defendant she had to go to the bathroom, got up, and left. A.W. said she did not tell anyone about this incident.

A.W. testified about a fourth incident. She said she again spent the night at H.S.'s house, this time during "spring break," which was during April or May of 2000. The two played in H.S.'s room, then her playroom, and then went to the den where the couch had been made into a bed for the two of them. A.W. said that the Defendant again came from his bedroom, lay down behind her, and touched her between the legs as he had done on the previous occasions. A.W. said she did not know where H.S. was at the time, and, to get away from the Defendant, she went to the bathroom. When she returned from the bathroom, the Defendant was still there, lying in the same position. She said she felt "really scared" because she did not know what he was going to do. A.W. said she did not see H.S., and she went back and laid back down on the bed with the Defendant. A.W. said that she eventually fell asleep. When she awoke in the morning, the Defendant was still in the bed.

A.W. said she did not tell anyone about these incidents until she learned the Defendant was leaving the church and moving back to Murfreesboro. A.W. told her mother about what the Defendant had done within half an hour of learning he was leaving the church. Her parents called church officials and the police.

On cross-examination, A.W. conceded that she had previously testified that she was asleep at the time the first incident started, which was inaccurate. She maintained she was awake and saw the Defendant standing in the doorway before he inappropriately touched her the first time. A.W. said

H.S. was in the room during the first incident, but she was unsure whether H.S. was asleep on the pull-out couch or in the chair. A.W. said she was scared by the first incident but agreed to spend the night a second time because she and H.S. "were good friends" and she did not want the incident to interfere with their friendship, and she was hoping that the Defendant would not do it again. A.W. testified she was positive that the person who touched her was the Defendant and not H.S.'s brother. A.W. agreed that she may not have mentioned the fourth incident until she was cross-examined during the preliminary hearing. She insisted, however, that the Defendant touched her on four separate occasions. A.W. testified she continued to return to the Defendant's house because she was afraid he would get angry if she did not return, she did not want everyone to become suspicious, and she wanted to remain friends with H.S.

Based upon this evidence, the jury found the Defendant guilty of four counts of aggravated sexual battery.

**B. Sentencing**

At the Defendant's sentencing hearing, the following evidence was presented: Donna Dunlap, with the Tennessee Board of Probation and Parole, testified that she prepared the presentence report in this case, and the report was admitted into evidence by the trial court. On cross-examination, Dunlap testified that the Defendant had no previous criminal history and had graduated from high school, college, and a technical school. The Defendant maintained steady employment, working for the same company from 1993 until he was incarcerated. The Defendant also served as a minister at Gath Baptist Church and served eight years in the National Guard, receiving an honorable discharge.

Matt Welcome, the victim's father, testified that the victim was eight years old at the time of these crimes. Welcome explained that he allowed his daughter to spend the night at the Defendant's home, in part, because of the Defendant's position as the youth minister. Welcome testified that his daughter no longer attended Gath Church after she reported being attacked because it was difficult for her to view the parsonage and because some of the members supported the Defendant, making it a difficult environment for her. Since these events, their whole family had left the Gath church and joined another church.

Welcome testified that the victim had attended counseling as a result of this incident. Before counseling, she was waking in the middle of the night crying and referring to the attacks. Welcome said that these attacks affected his daughter's behavior, causing behavioral and academic problems. He said that, before the trial, she began suffering anxiety attacks and had to be removed from school. Doctors prescribed for the victim anxiety pills and sleeping pills. Welcome said that his daughter was outgoing before these incidents but, since the incidents, she had become somewhat withdrawn.

On cross-examination, Welcome agreed that the Defendant was not the youth minister to the victim's age group and that the reason that the victim initially spent the night was because she was friends with the Defendant's daughter. Welcome agreed that the victim never complained of the Defendant's behavior until he was leaving the church.

Carolyn Simmons, the Defendant's mother, testified that her son was loved by everyone in their home town. She said she was proud that her son would not take any plea offers because he maintained his innocence. She described him as the perfect son and a wonderful student. She spoke highly of his musical talents and achievements, working for a time as the music director or youth minister for his church. Simmons testified that there had been no allegations of any impropriety on the Defendant's part at any of his previous churches.

Simmons testified that the Defendant had suffered "serious nervous" problems as a result of his incarceration and the criminal proceedings. Simmons testified that the Defendant's father, from whom she was divorced and who died before the proceedings in this case, was an exhibitionist who had exposed himself to little girls.

Simmons testified that the Defendant was innocent of these convictions, saying that he was in Missouri during one of the alleged attacks and living in Murfreesboro during another alleged attack. Simmons said that she had been told that the victim was no longer welcome at the Defendant's house in May of 2000 because of problems between the victim and the Defendant's daughter.

The Defendant testified about his educational and work history, including his service in the National Guard. He said that he had worked as a music and youth minister in many of the churches he had attended. The Defendant said that he and his wife were still married, and, while he had no children of his own, he helped to raise his wife's two children. The Defendant said that he planned to offer proof during his motion for new trial that he had an alibi for the date of the alleged attacks. He said he could not offer this proof at trial because he was not aware before trial of the dates the victim alleged the attacks occurred. He said he had concrete tangible proof that three of the instances were "totally impossible."

At the conclusion of this hearing, the trial court sentenced the Defendant to twelve years on each count, to be served at 100%, and ordered the sentences to run consecutively to each other. In a subsequent hearing, the trial court reduced the Defendant's sentences to eight years each, based upon *Blakely v. Washington*, 542 U.S. 296 (2006). The trial court ordered that the sentences remain consecutive, for an effective sentence of thirty-two years at 100%.

## II. Analysis

On appeal, the Defendant contends: (1) the evidence is insufficient to sustain his convictions; (2) the trial court improperly instructed the jury after the jury became deadlocked; and (3) the trial court erred when it ordered consecutive sentencing. The State asks this Court to dismiss the appeal because the Defendant failed to file a timely motion for new trial or a timely notice of appeal.

### A. Jurisdiction

We first address the State's request that we dismiss this appeal because the Defendant failed

to file a timely motion for new trial or notice of appeal. The Tennessee Rules of Appellate Procedure require us to determine whether we have jurisdiction in every case on appeal. *See* Tenn. R. App. P. 13(b). In criminal cases, an appeal as of right lies from a final judgment of conviction. Tenn. R. App. P. 3(b). Filing a notice of appeal within thirty days of the final judgment date initiates the appeal; however, this Court has authority to waive "in the interest of justice" the untimely filing of a defendant's notice of appeal. Tenn. R. App. P. 4(a). If a timely motion for new trial under Tennessee Rule of Criminal Procedure 33(b) is filed, however, "the time for appeal . . . shall run from entry of the order denying a new trial . . . ." Tenn. R. App. P. 4(c).

Tennessee Rule of Criminal Procedure 33(b) provides that a party requesting a new trial must file his request within thirty days of the entry of the order of his sentence. Tennessee Rule of Appellate Procedure 3(e) provides that, in all cases tried by a jury, a defendant waives any issue relating to an "action committed or occurring during the trial . . . or other ground upon which a new trial is sought" unless the defendant raises such issue in a motion for a new trial. *See State v. Keel*, 882 S.W.2d 410, 416 (Tenn. Crim. App. 1994). Unlike the untimely filing of a notice of appeal, this Court does not have authority to waive the untimely filing of a motion for new trial. *State v. Stephens*, 264 S.W.3d 719, 728 (Tenn. Crim. App. 2007); *see* Tenn. R. App. P. 4(a). Also, because this provision is mandatory, the time for filing may not be extended. *See* Tenn. R. Crim. P. 45(b); *State v. Martin*, 940 S.W.2d 567, 569 (Tenn. 1997). Further, the untimely filing of a motion for new trial does not toll the time for filing a notice of appeal; therefore, a late-filed motion for new trial will generally result in an untimely notice of appeal. *State v. Patterson*, 966 S.W.2d 435, 440 (Tenn. Crim. App. 1997).

We agree with the State that the Defendant's motion for a new trial was untimely. The Defendant's motion for new trial, filed on January 8, 2007, was filed more than three years after the Defendant was originally sentenced, on December 16, 2003, and almost two years after the trial court modified the Defendant's sentence on March 22, 2005. Defendant's counsel notes that he was not appointed until February 9, 2006, which was beyond the filing deadline for a timely motion for new trial. This, however, does not relieve the Defendant from the requirement that his motion for new trial be timely filed. Further, the motion for new trial was not filed until almost a year after Defendant's counsel's appointment. As such, the Defendant's motion for new trial was filed late. *See* Tenn. R. Crim. P. 33(b). The trial court considered and ruled on the Defendant's motion for new trial even though it was untimely. The trial court's jurisdiction to grant the Defendant a new trial, however, expired thirty days after it entered the sentencing order. *Martin*, 940 S.W.2d at 569; *Stephens*, 264 S.W.3d at 728. As such, the trial court had no jurisdiction to hear the Defendant's motion for a new trial, and the order issued denying a new trial was a nullity and "does not validate the motion." *Martin*, 940 S.W.2d at 569.

When the motion for a new trial is not timely filed, the appellate court will consider only those issues that would result in the dismissal of the case, including sufficiency of the evidence, or a sentencing issue. Tenn. R.App. P. 3(e); *see also State v. Boxley*, 76 S.W.3d 381 (Tenn. Crim. App. 2001); *State v. Timothy Wayne Henderson*, No. 01C01-9801-CC-00001, 1998 WL 731576, at *1 (Tenn. Crim. App., at Nashville, Oct. 21, 1998), *no Tenn. R. App. P. 11 application filed*. We

conclude the Defendant, by failing to file a timely motion for new trial, waived review of his objections to the trial court's instruction to the jury after the jury became deadlocked. *See Stephens*, 264 S.W.3d at 728; Tenn. R. App. P. 3(e). Because the remaining two issues raised by the Appellant on appeal involve the sufficiency of the evidence and sentencing, we elect, in the interest of justice, to waive the untimely filing of the notice of appeal and review the issues upon the merits.

**B. Sufficiency of the Evidence**

The Defendant asserts that the evidence is insufficient to sustain his convictions because his convictions were based on the unreliable testimony of the alleged victim and there was no proof that he touched the victim for sexual gratification. The State counters that there is sufficient evidence to support the convictions.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see* Tenn. R. App. P. 13(e), *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). A conviction may be based entirely on circumstantial evidence where the facts are "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." *State v. Smith*, 868 S.W.2d 561, 569 (Tenn. 1993). The jury decides the weight to be given to circumstantial evidence, and "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury." *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citations omitted).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 479 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced

with a written record in this Court.

*Bolin v. State*, 405 S.W.2d 768, 771 (Tenn. 1996) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000). Importantly, the credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the evidence are matters entrusted exclusively to the jury as the trier of fact. *Bland*, 958 S.W.2d at 659.

The jury convicted the Defendant of four counts of aggravated sexual battery, which is defined by statute as the "unlawful sexual contact with a victim by the defendant or the defendant by a victim" where "[t]he victim is less than 13 years of age." T.C.A. § 39-13-504(a)(4). "Sexual contact" is "the intentional touching of the victim's, the defendant's, or any other person's intimate parts, . . . if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." T.C.A. § 39-13-501(6). "'Intimate parts' include the primary genital area, groin, inner thigh, buttock or breast of a human being." T.C.A. § 39-13-501(2).

The Defendant first contends that the evidence is insufficient to sustain his convictions because it is based solely on the testimony of the victim, who he contends was unreliable. This Court has previously stated that the testimony of a victim is sufficient evidence in and of itself to support a conviction. *State v. Strickland*, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993); *State v. Williams*, 623 S.W.2d 118, 120 (Tenn. Crim. App. 1981); *State v. Eric Condrell O'Neal*, No. M2007-00097-CCA-R3-CD, 2009 WL 4017157, at *3 (Tenn. Crim. App., at Nashville, Nov. 20, 2009). The issue is whether the victim's testimony is credible. As stated above, the credibility of a witness is an issue to be determined by the jury. *Bland*, 958 S.W.2d at 659. Clearly, in this case, the jury found the victim to be a credible witness.

The Defendant next contends that the evidence is insufficient to sustain his convictions because there is no proof that he touched the victim for sexual gratification. We have previously recognized that "jurors may use their common knowledge and experience in making reasonable inferences from evidence." *State v. Meeks*, 876 S.W.2d 121, 131 (Tenn. Crim. App. 1993) (determining that a jury can draw on common knowledge and experience to ascertain if the defendant touched the victim for sexual arousal or gratification).

In the case under submission, the pastor at the Defendant's church testified that the Defendant told him that he was having marital problems and had not engaged in sexual intercourse in more than two-and-a-half years. The Defendant said he was, therefore, having problems "relating" to women. The Defendant would have sought counseling for these "problems" but feared the repercussions. At the conclusion of this meeting, the pastor determined that the Defendant should no longer work with

the church youth. During the time period that the Defendant was having marital problems, he inappropriately touched the victim on several occasions. On each occasion, she was spending the night in his home. During the late night hours, he entered the room in which the victim was resting, lay behind her, placed his hands inside her pants between her legs and rubbed her. He told her that "other girls liked" this type of touching. We conclude this is ample evidence upon which the jury could find that the Defendant touched the victim for his own sexual gratification. As such, we conclude he is not entitled to relief on this issue.

### C. Consecutive Sentencing

The Defendant next challenges the trial court's decision to order consecutive sentencing, which was imposed pursuant to Tennessee Code Annotated section 40-35-115(b)(5). Specifically, the Defendant submits that this sentence is excessive, considering the evidence adduced at the trial and the sentencing hearing. The State asserts that the trial court properly imposed consecutive sentences.

When a defendant challenges the length, range, or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). This presumption, however, is conditioned upon the affirmative showing in the record that the trial court properly sentenced the defendant. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). As the Sentencing Commission Comments to this section note, the burden is on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. If the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result was preferred. T.C.A. § 40-35-103 (2006), *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994). In the event the record fails to demonstrate the required consideration by the trial court, appellate review of the sentence is purely de novo. *Ashby*, 823 S.W.2d at 169.

In conducting a de novo review of a sentence, we must consider: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the mitigating and enhancement factors set out in Tennessee Code Annotated sections 4-35-113 and -114; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and (7) any statement the defendant made in the defendant's own behalf about sentencing. *See* T.C.A. § 40-35-210 (2009); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

It is within the sound discretion of the trial court whether or not an offender should be sentenced consecutively or concurrently. *State v. James*, 688 S.W.2d 463, 465 (Tenn. Crim. App. 1984). A court may order multiple sentences to run consecutively if it finds, by a preponderance of the evidence, that at least one of seven listed factors exists, including factor (5), that "[t]he defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims." T.C.A. § 40-35-115(b)(5).

In the case under submission, the Defendant was ultimately sentenced to eight years, the minimum sentence within his range for each of his class B felony offenses. The trial court ordered these sentenced be served consecutively, for a total effective sentence of thirty-two years, to be served at one hundred percent. In so finding, the trial court stated:

> The question is discretionary consecutive sentencing. The one factor that could apply, and I find does apply, is the defendant is convicted of two or more statutory offenses involving sexual abuse of a minor with consideration of aggravating circumstances arising from the relationship between the victim and the defendant.
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> . . . .
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> I take into consideration the approximately seven (7) months that this went on, these four (4) different incidents from September to March. That is seven (7) months. I consider that to be . . . [i]t is not something that happened in a night or two. It went on. . . . I consider that to be a fairly long period of time for something like this to happen.
>
> The relationship between the defendant and the victim. She couldn't tell. According to her, she couldn't tell because he was still there. You know, that just makes it that much worse. If she could have told the first time, or felt like she could, but she was eight (8) years old. If she feels like she can tell the first time, maybe it doesn't happen the other three (3) times. But it does. That is where the trust comes in. It is gone for her. I find that that does apply. I have considered the aggravating circumstances arising from a relationship between the defendant and the victim. I find that to be horrid. It was over a seven month period. The nature and scope of the sexual acts. The damage to the victim. Granted there is no physical damage, but that would be a whole different offense. That would be rape of a child instead of aggravated sexual battery.

We conclude that the trial court did not abuse its discretion when it imposed consecutive sentences. First we note that the presentence report is absent from the record. In the absence of such proof, we are constrained to presume the correctness of anything the trial court relied upon from the

report. *State v. Ballard*, 855 S.W.2d 557, 561 (Tenn. 1993). There is, however, sufficient proof to support the trial court's finding. This assault occurred over a seven-month period of time and was perpetrated by a church official, who was also the victim's friend's step-father. The victim, who was only eight years old and who attended the church where the Defendant was a youth minister, felt she could not tell anyone about the abuse. On one occasion, the Defendant encouraged the victim to spend the night, telling her it was too late to take her home. He then assaulted her while she slept in his home near his step-daughter. The victim's father testified that the victim still suffered emotionally as a result of these assaults. He said his once outgoing daughter had become withdrawn. She would wake in the middle of the night crying and talking about the attacks, and she had trouble in school at times, with her grades suffering. Doctors prescribed the victim medication for her anxiety attacks and sleeping pills. She was, at the time of the trial, only twelve years old. This evidence supports the trial court's imposition of consecutive sentences, and the Defendant is not entitled to relief on this issue.

## III. Conclusion

Based on the foregoing reasoning and authorities, we affirm the judgments of the trial court.

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ROBERT W. WEDEMEYER, JUDGE